
(2000) 05 DEL CK 0042

In the Delhi High Court

Case No : Civil Writ Petition No. 7602 of 1999 and No. 359 of 2000

M/s. J.S. Continental Ltd., and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-05-2000

Acts Referred:

Citation : (2000) 54 DRJ 552 : (2000) 4 RCR(Civil) 474

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Advocate : Mr. Rajiv Nayyar, Mr. V.P. Singh, Mr. P. Nandrajog and Mr. Sandeep Sethi, for the Appellant; Mr. Sudhir Chandra, Mr. R.P. Bhatt and Mr. Parijat Sinha, for the Respondent

Judgement

Manmohan Sarin, J.—Petitioners M/s. J.S. Continental Ltd. & Ors., in Civil Writ Petition No. 7602/99 are seeking another inter alias a direction to the respondents not to engage more than 6750 truck tankers pursuant to the tender. Further, it is prayed that respondents be directed to engage all the truck tankers at the same rate. Priority is also claimed in loading and unloading of the truck tankers of the petitioners.

2. Capt. Vijay Malik & Others, petitioners in Civil Writ Petition No. 359/2000, are also seeking a direction to the respondents 2 to 4 to accept the tenders of all the bidders, starting from the lowest till 6750 number of truck tankers are taken on hire and not to accept any tender beyond the number of 6750 truck tankers. A direction is also sought that the existing tenderers should not be given priority overlooking the claims of tenderers who have offered to fabricate and provide tankers at lower rates. Alternatively, a direction is sought that respondents 2 to 4 should give priority of loading and unloading, route preference and to ensure 100% utilisation of the truck tankers offered at lower rates before utilising the tankers offered at higher rates.

3. The facts giving rise to these writ petition may be briefly noted :

(i) M/s. Indian Oil Corporation Limited, M/s. Bharat Petroleum corporation Ltd. and M/s. Hindustan Petroleum Corporation Ltd., respondents 2 to 4 respectively, invited tenders for the bulk LPG Transportation Contract, viz. Tender Nos. LPG/LOG/9 (NR)99, LPG/LOG/9 (WR)99, LPG/LOG/9 (SR)99 and LPG/LOG/9 (ER)99. Bids were invited from LPG truck owners and corporations, owners and distributors for award of separate contracts for road transportation of bulk LPG for a period of two years with option to extend, for a further period of one year. The tender specified the sources from where the bulk LPG was to be transported to the refineries of the respondents in the regions and zones indicated.

(ii) The crux of the controversy in the writ petitions emanates from the stipulation in the tender, viz. "estimated tank-truck requirement on account of Industry during the period of operation is approx. 6750 Nos. However, this number would depend on our requirement and capacity of Tank-Trucks offered." Respondent corporations also reserved the liberty to require the contractors to divert and operate the tank trucks from any loading base. Provision was also there for escalation and de-escalation of rates. The unit cost calculation was worked out, taking the average capacity of tank trucks at 15 MT.

4. Learned counsel for the petitioners in CW. 7602/99 has urged before me that respondents had failed to indicate in the tender the distribution points or the distance to be covered or the expected idling time. In the absence of these datas, petitioners had based their bids solely on the information given with regard to the total requirement of 6750 trucks and, accordingly quoted their rates based on the total utilisation of 6750 trucks and had worked out their idling time, etc. based only on the same. The respondents have unilaterally sought to vary this fundamental term by increasing the requirement and utilization of truck tankers to 10000. The precise argument of the learned counsel for the petitioners is that the capacity of the bottling plants is fixed and the trucks can only carry a certain fixed quantity. With increased number of trucks being available, the idling time as well as cost of operation and the route and trips which the trucks could do would get affected to petitioners" prejudice. Petitioners, it is submitted, would not have quoted the rates they did, had they known that the total trucks available for utilisation for transportation would be 10,000. Their rates would have been much higher. Learned senior counsels for the petitioners further submitted that as a result of the respondents having increased the number of truck tanker, an anomalous situation has arisen in which the respondents, for the same route and distance, would be paying a lower rate to the petitioners, while other bidders of the cartel would be getting a higher rate for the same distance. Learned counsel for the petitioner relied on a circular filed on record, wherein it is brought out that the Association of the other bidders have all quoted a uniform higher rate, being members of the cartel. It is in this background that the petitioners have sought the reliefs mentioned.

5. Learned senior counsel for the petitioners in CW. 359/2000, Mr. V.P. Singh, submitted that the respondents have chosen to vary the basic terms of the

tender and have altered the same. Thus, their actions are liable to judicial scrutiny. If the respondents wanted to change the basic terms of the tenders, they should have called fresh tenders. The tender inviting offers was lacking in material particulars. The respondents should have given their requirement of truck tankers on regional or zonal basis and their approximate monthly or annual running kilometers. These were vital inputs to enable the bidders to quote a fair and workable transportation rate. Far from doing that, the respondents have significantly increased their total truck tankers requirement. Even if the quantity mentioned was approximate, a steep variation is not what is contemplated by the word "approximate". While it is true that the tender stipulation gave the estimated tanker truck requirement during the contract period operation as "approximate", yet a steep variation is not what was contemplated or permissible. Learned counsel placed reliance on *Belloti Vs. Chequers Developments Ltd.* 1936 (1) All ELR 89. In the above case, a purchaser of a plot was told that the dimension of the rear garden was 40" x 30" approximately. It turned out to be 36" instead of 40". The Court, in the peculiar facts of the case held it to be a material representation which would have induced the purchaser to enter into the contract. The Court held, "I cannot believe that 36" is approximately 40", I can understand 36" approximately to be 35 ft." . Learned counsel for the petitioner, Therefore, argued that use of the word " approximate" in the tender stipulation cannot justify the steep variation or increase in the truck tanker requirement from 6750 to 10000.

6. Learned counsel for the petitioners submitted that a large number of tenderers had formed a cartel. Reliance was placed on *ESSO Petroleum Co. Ltd. Vs. Mardon*, 1976 (2) All ER 5 by the petitioners. In this case, during pre-contract negotiations a forecast of petrol rates was made by the representative of the oil company having special knowledge. The forecast of sale of petrol from 3rd year of operation was 2,00,000 gallons. Because of change of site and plan of the station, only 78,000 gallons of petrol was consumed. The defendant incurred losses and lost all his capital. It was held that it was open for the Court to construe the forecast, not merely as an expression of opinion, but Constituting a warranty that the forecast was reliable. Further, that since the estimate had been made negligently and was unsound, the petrol company was held liable for breach of that warranty.

7. The above two decisions, in my view, would not advance petitioners" case in the present facts. The stipulation in the present contract clearly mentions the same as an "estimated requirement" as also being an "approximate" number. It was also specifically stipulated, "However, this number would depend on our requirement and capacity of the tanker trucks offered". Thus, a caveat was added with regard to a variation in the number, depending upon the requirement and the capacity of the tank trucks offered.

8. Learned senior counsel, appearing on behalf of respondents 2 to 4, during the course of their submissions laid emphasis on the indicated quantity being an

"approximate" one and there being no fetter on increasing of varying the quantity. The respondents have filed an additional affidavit dated 26.4.2000 of the Manager of respondent No. 3, enclosing the various communications received from the Ministry of Petroleum and Gas. In the affidavit it has been explained that the programmes for enrollment of new customers for LPG as also for giving second cylinders to the existing customers has been changing from time to time, as per the directions of the Government of India. The Central Government vide its letter dated 15.2.1999 intimated that instead of 40 lakh new connections that had been projected earlier, 50 lakh new connections would be released during the period from April 1999 to March 2000. Thereafter, by another letter dated 31.3.1999, it was intimated that a higher enrollment of 50 lakh new connections, followed by 40 lakh connections per annum for the succeeding years was proposed. By another letter dated 11.6.1999 the Ministry intimated that the new connections for LPG would now be 70 lakhs for the year 1999-2000. Finally, another letter dated 10.1.2000 was received from the Ministry of Petroleum and Natural Gas, intimating that the new target for LPG connections in the year 2000 would be 1.0 crore and that 60 lakhs second cylinders would be released as against 30 lakhs envisaged earlier. The Ministry of Petroleum and Natural Gas, vide its letter of 26.2.2000 notified the oil companies that the release of 1.0 crore LPG connections would require extra movement of LPG and the oil industry was, Therefore, required to generate adequate movement capacity in terms of tanker trucks to meet the peak season demand.

From the foregoing it would be seen that the respondents had acted bonafide in their initial estimate but the changed requirements were at the instance of the Central Government. Learned counsel for the petitioners submitted that due to the change in objectives and other imponderable factors, it was not possible for the respondents to precisely work out the requirement of the tank trucks and the routes thereof. The respondents had the right to increase the requirement. In the instant case, the number of LPG users had increased from 40 lakhs to 1.0 crore. Thus, there was a need to cater to a far larger number of customers with increased requirements of transportation. He contended that as far as the petitioners were concerned, they really had no right or locus to object to question the right of the respondents to alter or enhance their requirement. Petitioners had quoted a rate, which would be accepted. Petitioners were offering only 145 trucks, out of which only 45 were owned by them and four were under fabrication. The real grievance of the petitioners is that they should be awarded work at the higher rate quoted by the other bidders.

9. Notice had been issued in the writ petitions on 1.1.2000. An interim order was passed directing that respondents shall not award transport contracts pursuant to the tender No. LPG LOG/N9 (NR99) beyond 6750 number of trucks.

10. Having heard learned counsel for the parties, the question that arises for consideration is whether the variation in the estimated quantity of requirement of 6750 truck tankers to 10000 tankers would vitiate the tender making process

and whether the respondents had the right to engage a higher number of trucks to meet their requirements. Secondly, whether the decision making process of the respondents has been irrational and suffers from procedural irregularity and arbitrariness, as outlined in *Tata Cellular Vs. Union of India*, . The principles for judicial intervention as outlined in the above case are:

1. The modern trend points to judicial restraint in administrative action.
2. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
3. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible.
4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking the decision to accept the tender or award i to contract is reached by process of negotiations through several tiers. More over than not, such decisions are made qualitatively by experts.
5. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi- administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle or reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*.
6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.
11. The respondents have clarified that their action has been bonafide and granted the nature of business and the requirements for transportation, which, of necessity, cannot be predetermined with any degree of precision due to the inherent uncertainties and vicissitudes. Respondents, for preserving the distribution system, have to ensure that there is prompt transportation based on the requirement at any point of time. Towards this end, if the respondents require, at any point of time, more trucks for transportation, then, of necessity, they have to hire increased number of trucks. The bidders and contractors, who have quoted lower rates, would be utilised first and the tank trucks offered at higher rate by the bidders would be engaged only after engaging the tank trucks available of the petitioners and others who have quoted lower rates. It is only when tank trucks at lower rates are not available that the tank truck of those with higher rates would be utilised. Preference of longer routes, as far as practicable, would also be given to those who have offered lower rates. It may be noted that none of the petitioners or other individual bidders have the capacity to meet the requirements. Their grievance emanates from the fact that a situation may arise where the petitioners would be paid at rates quoted by them, which

may be lower while others who had quoted higher rates may get paid at higher rates quoted by them. It may also be noted that all the bidders had quoted the rates based on the specified requirement of 6750 tank trucks and if some bidders had quoted a higher rate and adequate number of trucks are not available of bidders who have quoted a lower rate, then the decision to engage and pay for transportation at higher rates to meet the requirements of transportation cannot be questioned.

In view of the foregoing discussion and applying the principles for judicial intervention, as noted above, I do not find that the decision of the respondents suffers from any illegality, irrationality or procedural impropriety. No ground is made out for entertaining this writ petition in exercise of discretion under Article 226 of the Constitution of India for the relief sought by the petitioners. The writ petitions have no merit and are dismissed.